Supreme Court, U. S.
FILED
AUG 9 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 76-190

* * *

**W. J. ESTELLE, JR. DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,**
Petitioner

v.

JOHN LERL COLE,
Respondent

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL
DUNKLIN SULLIVAN
PATRICK P. ROGERS
Assistant Attorneys General

Attorneys for Petitioner

P.O. Box 12548, Capitol Station
Austin, Texas 78711

INDEX

Page

OPINION BELOW 1

JURISDICTION 2

QUESTION PRESENTED FOR REVIEW 2

CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

STATEMENT OF THE FACTS WITH ARGUMENT 4

CONCLUSION 8

CERTIFICATE OF SERVICE 8

TABLE OF AUTHORITIES

Cases — Page

Cole v. State, 484 S.W.2d 779 (Tex.Crim.App. 1972); reh. den., September 25, 1972 ..... 2, 3

Harrington v. California, 295 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969) 6

Jackson v. Deno, 378 U.S. 368 (1964) 4, 5

Rogers v. State, 468 S.W.2d 438 (Tex.Crim.App. 1971) 6

Stone v. Powell, ___U.S. ___, 19 Cr.L. 3333, No. 74-1055 (July 6, 1976) 2, 7

Wolf v. Rice, ___U.S.___, 19 Cr.L. 3333, No. 74-1222 (July 6, 1976) 2, 7

APPENDIX

		Page
Appendix A —	Summary Opinion of United States Court of Appeal for Fifth Circuit, *Estelle v. Cole*, 75-3283	A-1
Appendix B —	Order of United States Court of Appeals for the Fifth Circuit Denying Motion for Rehearing, *Estelle v. Cole*, 75-3283	B-1
Appendix C —	Unreported Opinion and Judgment of United States District Court for Northern District of Texas, *Cole v. Estelle*, CA-3-74-706-D	C-1
Appendix D —	Opinion of Texas Court of Criminal Appeals — *Cole v. State*	D-1
Appendix E —	Stay of Mandate of United States Court of Appeals for the Fifth Circuit	E-1
Appendix F —	Denial of Extension of Stay of Mandate of United States Court of Appeals for the Fifth Circuit	F-1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. _____

* * *

W. J. ESTELLE, JR. DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

v.

JOHN LERL COLE,
Respondent

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

The petitioner, W. J. Estelle, Jr., Director of the Texas Department of Corrections, respectfully prays that this court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, for review of its judgment entered April 1, 1976, in the above entitled cause, and in which rehearing was denied on May 10, 1976.

OPINION BELOW

The United States Court of Appeals for the Fifth Circuit did not deliver a written opinion when this cause was presented for original review or for review on rehearing. (See Appendix A and B).

The opinion and judgment of the United States

District Court for the Northern District of Texas, Dallas Division, is unreported; but a copy of said opinion and judgment is attached hereto as Appendix C.

The opinion and judgment of the Texas Court of Criminal Appeals, which reviewed the conviction on direct appeal from the State trial court, is reported as *Cole v. State*, 484 S.W. 2d 779 (Tex.Crim.App. 1972); reh. den. Sept. 25, 1976. A copy of said opinion is attached hereto as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 1, 1976. (Appendix A). The petitioner timely filed a motion for rehearing with the suggestion for a rehearing in banc, which was denied on May 10, 1976. (Appendix B).

This court has jurisdiction to grant a writ of certiorari pursuant to the provisions of 28 U.S.C., §1254(1).

QUESTION PRESENTED FOR REVIEW

The question presented for review to this court is whether, in light of *Stone v. Powell*, ___ U.S. ___, 19 Cr.L. 3333, No. 74-1055 (July 6, 1976), and *Wolf v. Rice*, ___ U.S. ___, 19 Cr.L. 3333, No. 74-1222 (July 6, 1976) the respondent, John Lerl Cole, is entitled to habeas corpus relief in the federal courts on the ground that certain evidence obtained in an unconstitutional search and seizure was introduced at his state trial where the state courts, at trial and upon direct review, provided opportunity for a full and fair litigation of the Fourth Amendment claim?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part:

> "The right of the people to be secure . . . against unreasonable searches and seizures . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

The respondent, John Lerl Cole, was convicted before a jury in the 194th State District Court of Dallas County, Texas, for a felony offense of robbery with firearms, State Cause No. 70-2404-LM. The jury assessed Cole's punishment at One Hundred, Twenty-Five (125) years confinement in the state penitentiary. The judgment and sentence were appealed to the Texas Court of Criminal Appeals; and, on June 21, 1972, the conviction was affirmed. *Cole v. State*, 484 S.W.2d 779 (Tex.Crim.App. 1972); reh. den., September 25, 1972. (Appendix D). At both the trial court and upon direct appeal to the Court of Criminal Appeals, the State courts reviewed the unconstitutional search and seizure contention involved herein.

Cole, thereafter, made an application for habeas corpus to the convicting state district court and said application was subsequently transferred to theTexas Court of Criminal Appeals pursuant to Article 11.07, Tex. Code Crim. Proc. Cole's state application was

denied without a written order on the findings of the trial court. (Cole did not raise the search and seizure points in his state application for habeas corpus).

Cole made an application for a writ of habeas corpus to the United States District Court for the Northern District of Texas, Dallas Division, on July 25, 1974. That court had jurisdiction to entertain his application pursuant to 28 U.S.C., §§2241 and 2254. An evidentiary hearing was not conducted; but, the Federal District Court granted Cole's application on August 8, 1975. (Appendix C). Your petitioner appealed this decision to the United States Court of Appeals for the Fifth Circuit, which summarily affirmed the decision on April 1, 1976; and summarily denied a rehearing on May 10, 1976. (Appendix A & B). Upon motion of your petitioner Estelle, the Court of Appeals stayed the issuance of its order and the mandate until June 24, 1976. (Appendix E). Thereafter, your petitioner applied to the Court of Appeals to extend the stay of the mandate but was denied. (Appendix F). Your petitioner now files his petition for certiorari within the time prescribed by 28 U.S.C. §2101(c).

STATEMENT OF THE FACTS WITH ARGUMENT

Prior to the trial of the case in chief, a *Jackson v. Deno*, 378 U.S. 368 (1964), hearing was held on Cole's motion to suppress a shotgun and shotgun shell which was seized by Officer H. O. Wilkinson upon the arrest of petitioner. At this hearing, Officer Wilkinson testified that on March 16, 1970, at or about 7:00 A.M., a confidential informer came to the Dallas Police Department and told Wilkinson that Cole had been involved in a robbery which occurred on March 11, 1970 (the instant case Cole attacked in his federal application

for habeas corpus) and that Cole was at his home in Dallas, Texas, preparing to leave immediately to participate in a second robbery. The informant told the officer that Cole had committed the March 11, 1970, robbery with a shotgun and the petitioner had a buick automobile.

As a result of receiving this information, Officer Wilkinson, accompanied by two other Dallas police officers and three sheriff's deputies, went to Cole's home in Dallas, Texas arriving between 7:30 and 8:00 A.M. The officers went to the front door of a house and announced that they were police officers. A woman answered "Just a minute" then opened the door saying, "Come on in". One of the officers stated "We're after Johnny Lerl Cole, is he here?" The woman responded that he was, and told the officers that they could "look around" the house. The officers then entered the house and proceeded through the livingroom, through the hall, and in the bathroom they found Cole. Officer Wilkinson testified that they saw Cole reaching into an overnight case and that Wilkinson pointed his gun at Cole. Officer Wilkinson testified that inside the overnight case he found a sawed-off shotgun and some shotgun shells. Following the *Jackson v. Deno* hearing, the trial court allowed the objects seized by Officer Wilkinson to be admitted into evidence.

During the trial before the jury, the State produced three eye-witnesses who positively identified Cole as being one of the culprits who participated in the robbery in question. One of the eye-witnesses, Gene Cravatt, testified that he was working in the canned goods isle when he first noticed the robbery in progress. As Cravatt turned around, he was three feet from Cole who was holding a single-barrel sawed-off shotgun on Cravatt.

Upon direct appeal to the Texas Court of Criminal Appeals, the Court found that the officers did not have an arrest warrant or a search warrant; and that the informant's tip was inadequate to constitute probable cause for the arrest. Accordingly, the Court found the search incident to the arrest was illegal; and that the items seized were not admissible on that basis. (Appendix D, pp. D-5). Next, the Court addressed itself to the question of whether the admission of illegally seized evidence was harmless error beyond a reasonable doubt under the particular facts before them. In affirming the conviction, the Court of Criminal Appeals concluded as follows, to-wit:

> In light of the unequivocal testimony of the three witnesses that the appellant was one of the robbers, and the rebuttal evidence that weakened the alibi of the defense, we feel that the error in admitting the shotgun was harmless. *Harrington v. California*, 295 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); *Rogers v. State*, 468 S.W.2d 438 (Tex.Crim.App. 1971). [Appendix D, pp. D-6]

Cole, thereafter, in his federal habeas corpus proceeding, contended that the State conviction should be overturned as the admission of illegally seized evidence was not harmless error beyond a reasonable doubt. In the federal Judge's order granting Cole's application for habeas corpus, he stated that he was relying upon the findings and conclusions of the United States Magistrate. In his Findings and Conclusions the Magistrate stated, in pertinent part; towit:

> This case is a fair example of the difficulty encountered in the application of the rules for suppressing illegally obtained evidence. A clear identification supports a verdict and will

> again. . . . (Appendix C, pp. C-5)

The United States Court of Appeals for the Fifth Circuit affirmed and your petitioner is now before this Court seeking reversal. In support of the issuance of a writ of certiorari and ultimate reversal of this cause, your petitioner relies upon this Court's recent decision of *Stone v. Powell*, ___U.S.___, 19 Cr.L. 3333, No. 74-1055 (July 6, 1976) and a companion case of *Wolf v. Rice*, ___U.S.___, 19 Cr.L. 3333, No. 74-1222 (July 6, 1976). In a combined opinion, in the *Stone* and *Wolf* cases, this Court stated as follows:

> In sum, we conclude that where the State has provided an opportunity for a full and fair litigation of a fourth amendment claim, a state prisoner *may not be* granted federal habeas corpus relief on the ground that the evidence obtained and unconstitutional search or seizure was introduced at his trial. 19 Cr.L. 3333, 3341. (emphasis ours)

The facts of the instant case are squarely aligned with those of *Stone v. Powell* and *Wolf v. Rice, supra*. The State trial court, although allowing the evidence to be admitted, conducted prior to its admission a *Jackson v. Deno* hearing outside the presence of the jury on Cole's Fourth Amendment claim. Cole's contention was thereafter presented for direct review by the Texas Court of Criminal Appeals which thoroughly considered the same. (Appendix D). Thus, in summary, the decision of the Court of Appeals of the Fifth Circuit is in direct conflict with this Court's decisions of *Stone v. Powell* and *Wolf v. Rice, supra*. Accordingly, this Court should apply the holdings of *Stone v. Powell* and *Wolf v. Rice, supra* to the instant case and grant a writ of certiorari, reverse the United Sates Court of Appeals for the Fifth Circuit and thereby enter an order denying Cole's application for habeas corpus.

CONCLUSION

For the reasons and authority set forth above, your petitioner prays that this Court grant his petition for writ of certiorari and either summarily reverse and render judgment in favor of petitioner Estelle or reverse after briefs have been submitted and arguments heard in this cause.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL
DUNKLIN SULLIVAN

PATRICK P. ROGERS
Assistant Attorneys General

P.O. Box 12548, Capitol Station
Austin, Texas 78711

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Dunklin Sullivan, a member of the Bar of the Supreme Court of the United States, do hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari have been served on the attorney of record for the respondent Cole by placing the same in the United States Mail, certified, return receipt requested, postage prepaid, addressed as follows: Mr. Robert T. Baskett, 2440 One Main Place, Dallas, Texas, 75250, this ____ day of _____, 1976.

DUNKLIN SULLIVAN
Assistant Attorney General

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DO NOT PUBLISH

NO. 75-3283
Summary Calendar*

JOHN LERL COLE,

Petitioner-Appellee,

versus

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent-Appellant.

Appeal from the United States District Court for the
Northern District of Texas

(April 1, 1976)

BEFORE BROWN, Chief Judge, GEWIN and MORGAN, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.1/

*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409. Part I.

1/See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

Issued as Mandate: JUN 30 1976

APPENDIX B

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

May 10, 1976

TO ALL COUNSEL OF RECORD

No. 75-3283 - John Lerl Cole v. W. J. Estelle,
Jr., Director, Texas Department
of Corrections

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Susan M. Seaman
Deputy Clerk

/smg

cc: Mr. Patrick P. Rogers
Mr. Donald A. Smyth
Messrs. Robert T. Baskett
Phil Burleson

APPENDIX C

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
AUG 8 1975
JOSEPH McELROY, JR., CLERK
BY _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JOHNNY LERL COLE)
)
VS.)
)
W. J. ESTELLE, DIRECTOR, TDC)

CA3-74-706-D

FINDINGS, CONCLUSIONS AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE

Pursuant to the provisions of 28 U.S.C. 636(b), and an Order of the Court in implementation thereof, the subject cause has previously been referred to the United States Magistrate. The findings, conclusions and recommendation of the Magistrate, as evidenced by his signature thereto, are as follows:

FINDINGS AND CONCLUSIONS:

The Petitioner is in the custody of the Respondent on the judgment and sentence of the 194th Judicial District Court, Dallas County, Texas, in State Cause No. 70-2404-LM. Petitioner was convicted by a jury of robbery with firearms and the jury assessed confinement in the penitentiary for 125 years. Petitioner's conviction was affirmed June 21, 1972. Cole v. State, 484 S.W.2d 779, reh. den. Sept. 25, 1972. On direct appeal the Petitioner raised the first issue presented in this writ.

The Petitioner in this application seeks habeas corpus relief on five issues previously raised and determined against him in the state court on direct appeal and in subsequent writ applications. Only the first issue is taken up here in light of the recommendation made.

The issue is can the admission in evidence of an illegally seized shotgun be determined "harmless error" under the facts.

The Texas Court of Criminal Appeals found the Petitioner's arrest and the subsequent search illegal and held that the admission into evidence of the shotgun and shell was error. The Court then reviewed the record and under all the facts applied the

"harmless error" rule citing Chapman v. Calif., 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Harrington v. Calif., 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970) and Rodgers v. State, Tex.Crim.App. (1971) 468 S.W.2d 438. Presiding Judge Onion dissented finding that he could not agree that the constitutional error was "... harmless beyond a reasonable doubt ..." Chapman v. Calif., supra.

The majority concluded:

> "In light of the unequivocal testimony of the three witnesses that appellant was one of the robbers, and the rebuttal evidence which weakened the alibi defense, we feel that the error in admitting the shotgun was harmless." Cole v. State, supra.

In the particular setting of this case the Petitioner argues that there is a reasonable possibility that the evidence complained of adversely influenced the jury and contributed to his conviction in denial of his constitutionally protected rights defined in Fahey v. Conn., 375 U.S. 85 (1963) and Chapman, supra. The effect, it is argued, is established in this case not only by the evidence itself but also "... by the extensive circumstances surrounding it in the manner in which it is offered in evidence" as defined in Reeves v. Warden, 4th Cir. (1965) 346 F.2d 915.

The Petitioner sets out in his brief pertinent protions of the Statement of Facts to support his position. He argues this record shows that the admission of the illegally seized shotgun (State's Exhibit 1) permitted the testimony of the investigating police officer witness. The officer witness testified to aggravated facts involved in the arrest of the Petitioner and the securing of this shotgun. He argues that this evidence introduced a real possibility that the jury's verdict may have been influenced

as to identification by its admission and thus may have been an important contribution to his conviction. He argues further that the effect of the admission of such evidence and testimony was intensified by multiple references in the prosecutor's argument to the jury in their attempt to bolster the allegedly vigorously disputed issue of identification.

The Respondent argues the record reflects positive identification by three eye-witnesses, one of whom testified to seeing the Petitioner holding the sawed-off shotgun, an issue the Petitioner has not seen fit to raise as such in this application. Further, that there is no real indication the prosecutor's words pointed to from the jury arguments were, in fact, unduly stressed or emphasized when such argument is taken as a whole.

The record discloses that three employees of the store robbed identified the Petitioner at trial. The first to testify (Phillips, the store manager) was cross-examined on his identification testimony concerning his prior examining trial testimony. The defense made serious effort to impeach the identification by attempting to show that at the examining trial Phillips had given testimony that he could identify only the most active robber with whom he was dealing but not the other two, including the Petitioner here. (S.F. 157). Referring to the examining trial testimony the witness testified "I believe I said I didn't know whether I could or not." (S.F. 158). The witness stuck by his answers on re-cross. (S.F. 160, 161). The second identification witness (Stover, the meat manager) who identified the Petitioner shows the Petitioner stationed himself at one point near the witness in the back of the store by the meat counter giving him a good opportunity for observation. The identification testimony was not shaken on cross. The third witness Cravatt (the stocker-

checker), gave particularly strong identification testimony in which he was personally confronted by the Petitioner holding a shotgun on him as Cravatt attempted to escape to the rear of the store. He was halted by the Petitioner who directed him back up to the front of the store where the robbery was taking place. Cravatt testified to being within "about three feet" of the Petitioner in a well-lighted area and that he had an opportunity to observe the Petitioner's face in a period involving "about a minute or two." (S.F. 190). Cravatt identified the shotgun in question from "... its sawed off" condition "and the way the wood comes up to the end of the barrel here." (S.F. 204). Extensive cross-examination failed to shake Cravatt's identification of the Petitioner. This identification of the shotgun by Cravatt enabled the state to put on their final witness, Police Officer Wilkerson, who testified to entering the Petitioner's residence five days after the robbery where on finding the Petitioner in the bathroom "... threw down on him" (S.F. 210) when the Petitioner made an effort to reach inside an overnight case later learned to contain the unloaded shotgun and a loaded shotgun shell.

The defense's alibi was through the wife and mother-in-law. Thus, the case turned wholly on identification and the potential influence of the admission of the shotgun and the circumstances surrounding its taking are readily apparent. When taken together with the repetitious and emphasized use of such illegal evidence in argument, the Petitioner is put in a strong position to argue the inappropriateness of the application of the "harmless error" rule to these facts. Against this is the clear conclusion to be drawn from the record of the overwhelming identification evidence pointing out the Petitioner as one of the perpetrators of the

robbery and permitting the application of the rule. Neither the cross-examination or the alibi witnesses, in combination, genuinely challenged the credibility of the witnesses identification of the Petitioner.

This case is a fair example of the difficulties encountered in the application of the rule suppressing illegally obtained evidence. The clear identification supports the verdict and will again, but the required balance in criminal trials must be maintained and in order to do so the relevant inquiry in these instances must be, in the language of the Supreme Court, "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Chapman, supra, 386 U.S. at 23. Only if the court can declare with confidence "beyond a reasonable doubt," Chapman, supra, 386 U.S. at 24, that such a possibility is excluded by the record can it pronounce a constitutional error to be harmless. In this instance the identification of the shotgun buttresses the identification of the Petitioner as perpetrator of the robbery. The aggravation inherent in the officer's testimony with respect to the seizure of the weapon and the repetitive use of the combination in argument requires a finding of error of constitutional dimension which cannot be held to be harmless beyond a reasonable doubt if the rule is to have the meaningful application that the language of the Supreme Court indicates.

RECOMMENDATION:

Accordingly, it is recommended that the Petitioner's writ be granted and that the Respondent be directed to retry the Petitioner with the complained of evidence being excluded or release him.

Patrick L. McElroy
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FILED
AUG 9 1975
JOSEPH McELROY JR., CLERK
BY ... Deputy

JOHN LERL COLE §
V. § CIVIL ACTION NO. CA-3-74-706-D
W. J. ESTELLE, DIRECTOR, TDC §

ORDER GRANTING APPLICATION FOR WRIT OF HABEAS CORPUS

After making an independent review of the pleadings, files and records in this case, and the findings, conclusions and recommendation of the United States Magistrate, I am of the opinion that the findings and conclusions of the Magistrate are correct and they are adopted as the findings and conclusions of the Court.

The Court is of the opinion that the admission into evidence of the illegally seized evidence was not harmless beyond a reasonable doubt and that there is a reasonable possibility that the illegal evidence might have contributed to the Petitioner's conviction. Chapman v. Calif., 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967).

IT IS, THEREFORE, ORDERED that:

1. One Hundred and Twenty (120) days after date of entry of this order all charges against Petitioner arising out of Indictment No. 70-2404-LM shall be dismissed and Petitioner shall be released from the criminal charges in said indictment unless within such one hundred and twenty (120) day period, or within such additional time as may be fixed pursuant to paragraph 2 herein, the State of Texas shall proceed to retry Petitioner in said cause.

2. On written motion filed herein within the one hundred and twenty (120) day period and upon a showing of good cause for doing so, the one hundred and twenty (120) day period fixed in paragraph 1 hereinabove may be extended by order of this Court.

3. In the event this Order is appealed from, the effect of the Order shall be stayed pending the determination of such appeal.

IT IS FURTHER ORDERED that the Clerk of this Court shall transmit a true copy of this Order, together with a true copy of the Findings, Conclusions and Recommendation of the United States Magistrate, to Petitioner, his counsel of record, to Respondent and to the Hon. John C. Vance, Judge, 194th Judicial District Court, Dallas County, Texas.

SIGNED AND ENTERED this 14 day of August, 1975.

United States District Judge

APPENDIX D

[6] Further, we note that the State did not attempt to bolster Crenshaw's in-court identification by use of any pretrial identification. And, still further, Sing, who was not shown by this record to have viewed any lineup, or show-up, etc. made a positive in-court identification of the appellant based on his observations at the scene of the crime. Clearly, if there was any error at all in admitting Crenshaw's courtroom identification, it was harmless error. Smith v. State, 450 S.W.2d 618, 621 (Tex.Cr.App.1970); Garcia v. State, 472 S.W.2d 784 (Tex.Cr.App.1971).

We have examined appellant's remaining grounds of error; all advanced by the pro se brief, and find them without merit or without support in this record.

The judgment is affirmed.

Johnny Lori COLE, Appellant,

v.

The STATE of Texas, Appellee.

No. 45813.

Court of Criminal Appeals of Texas.

June 21, 1972.

Rehearing Denied Sept. 25, 1972.

Defendant was convicted before the 194th District Court, Dallas County, John C. Vance, J., of robbery by assault and he appealed. The Court of Criminal Appeals, Roberts, J., held that where officer had not previously received information from informant who informed him that defendant had been involved in robbery, was at certain address, was preparing to leave immediately and was going to participate in another robbery and informant did not state how he had obtained his information, information provided by informant was insufficient to provide probable cause for warrantless arrest or search, and shotgun and shotgun shell seized incident to arrest were inadmissible; however, error in admitting such evidence, was harmless in light of unequivocal testimony of three witnesses that defendant was one of the robbers and rebuttal evidence which weakened defendant's alibi.

Affirmed.

Morrison, J., concurred in result.

Onion, P. J., dissented and filed opinion.

1. Arrest ⇐63(4)
Searches and Seizures ⇐3.3(2)

Standards applicable to determining whether facts of a particular case support arresting officer's probable cause assessment at time of challenged arrest and search are at least as stringent as standards applied when reviewing decision of magistrate.

2. Arrest ⇐63(4)
Criminal Law ⇐394.4(11), 1169(1)
Searches and Seizures ⇐3.3(3)

Where officer had not previously received information from informant who informed him that defendant had been involved in robbery, was at certain address, was preparing to leave immediately and was going to participate in another robbery, and informant did not state how he had obtained his information, informant's information was insufficient to supply probable cause for warrantless arrest and search and shotgun and shotgun shell seized incident to defendant's arrest were inadmissible; however, error in admitting such evidence was harmless where three witnesses testified unequivocally that defendant was one of the robbers and rebuttal evidence weakened defendant's alibi defense.

3. Arrest ⇐63(4)
Searches and Seizures ⇐3.3(2)

Mere assertion or conclusion that an informant is credible, without more, is an insufficient basis for establishing probable cause for warrantless arrest or search based on informant's tip alone.

4. Arrest ⇐63(4)
Searches and Seizures ⇐3.6(3)

Hearsay information which is insufficient to constitute probable cause for arrest or search may become sufficient if adequately corroborated by independent observation of arresting officer or, in the case of a warrant by affiant; however, information gained by observation must in some sense be corroborative of informer's tip that arrestees committed felony or were in process of committing felony.

5. Arrest ⇐63(4)

Facts that arresting officers found defendant where informant said he would be found and saw automobile of make which informant told officers defendant had were not corroborative of tip that defendant had committed robbery and that he was planning to commit another robbery and did not cause informant's tip to become sufficient to give officers probable cause for warrantless arrest and search.

6. Searches and Seizures ⇐3.3(1)

Exigent circumstances, no matter how compelling, will not justify search where probable cause is lacking.

7. Searches and Seizures ⇐3.3(4)

Seizure of shotgun pursuant to illegal arrest was not legal as being seizure of contraband in open view where shotgun was found inside overnight case subsequent to defendant's arrest.

8. Searches and Seizures ⇐7(27)

Where woman who answered door of house where officers believed defendant to be was not told that officers were planning on conducting search but was merely told that officers were after defendant, there was no testimony that woman was aware of her right to refuse to consent to search and officers were armed with shotguns, woman's consent to "look around" did not constitute consent to search premises.

9. Searches and Seizures ⇐7(28)

It is not necessary to show that person consenting to a search was warned of his right to refuse or that he knew of his right to do so to support finding that consent was freely and knowingly given; however, such showing is of evidentiary value in determining whether valid consent was given.

10. Criminal Law ⇐1159(1)

Admission of illegally seized evidence may be harmless error.

11. Criminal Law ⇐1162

Before error of constitutional dimension can be held to be harmless, reviewing court must be able to declare that it was harmless beyond reasonable doubt.

12. Criminal Law ⇐1202(3)

Set of fingerprints which was contained in "prison packet" holding records of five prior convictions of defendant and which matched set of fingerprints taken from defendant referred to packet as a whole and not just to one prior conviction; thus, all five convictions rather than just one were admissible.

13. Criminal Law ⇐1119(4)

Record failed to support defendant's contention that prosecutors had suppressed evidence seized at time of his arrest and allegedly consisting of note which was used in charged robbery and which was allegedly vital to defendant's defense. U.S.C.A. Const. Amends. 4, 9, 14.

14. Criminal Law ⇐1037(1)

Any error with respect to argument by prosecutor was not preserved for review absent objection to the argument.

Emmett Colvin, Jr., Norman Kinne, Dallas, for appellant.

Henry Wade, Dist. Atty., and Harry J. Schulz, Jr., Asst. Dist. Atty., Dallas, and Jim D. Vollers, State's Atty., Austin, for the State.

OPINION

ROBERTS, Judge.

This is an appeal from a conviction for robbery by assault. Trial was held before a jury, which assessed punishment at confinement for one hundred and twenty-five years.

In his brief, appellant sets forth two grounds of error. In his first ground of error, he contends that the trial court erred in overruling his motion to suppress evidence and in admitting a shotgun and shotgun shell into evidence for the reason that the shotgun and shell were the fruits of an illegal search and seizure.

Prior to trial, a hearing was held on appellant's motion to suppress evidence. At the hearing, Wilkerson, a Dallas police officer, testified that about 7:00 a. m. on the morning of March 16, 1970, an informer came to the Dallas Police Department and told him that appellant had been involved in a robbery which occurred on March 11, 1970 (the instant case) and that he (appellant) was at a house on Fourth Street in Dallas and was preparing to leave immediately, and that appellant was going to participate in another robbery (apparently on the same day). The informant told the officer that appellant had committed the robbery in question with a shotgun and that appellant had a Buick automobile.

The officer testified that he had not received information from the informant in the past, and that the informant did not state how he had obtained his information that appellant had committed the robbery and was planning to commit another robbery.

As a result of receiving this information, the officers, accompanied by two other Dallas police officers and three sheriff's deputies, went to the location on Fourth Street, arriving between 7:30 and 8:00 a. m. The officers went to the front door of the house, and announced that they were police officers. A woman inside answered, "Just a minute" and then opened the door saying, "Come on in." One of the officers stated: "We're after Johnny Lerl Cole, is he here?" And the woman answered that he was, and told the officers that they could "look around" the house. The officers then entered the house with shotguns in hand, and proceeded through the living room of the house, through a hall, and into the bathroom,[1] where they found appellant. Wilkerson testified that he saw appellant reaching into an overnight case and that he "threw down on him with . . . my weapon, and told him to hold it right there." The shotgun and shell were found in the case.

Appellant contends that the seizure of the shotgun and shell was illegal because (1) the officers lacked probable cause either to arrest appellant or to conduct a search of the house where he was found and (2) there was no valid consent given to search the house.

If the arrest was legal, then the seizure of the shotgun, which was found in the case into which appellant was reaching, was legal as a search incident to a lawful arrest. Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). Therefore, the question which should first be determined is the legality of the arrest for if it was legal, the remaining issues regarding the search need not be decided.

[1] The officers had neither an arrest warrant nor a search warrant; however, the standards applicable to determining whether the facts of a particular case support the arresting officers' probable cause assessment at the time of the challenged arrest and search are at least as stringent as the standards applied when reviewing the decision of a magistrate. Whiteley v. Warden, Wyoming Penitentiary, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306; Beck v. Ohio, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142; Brown v. State, 481 S.W.2d 106 (Tex.Crim.App., 1972); Fry v. State, No. 44,537 (Tex.Crim.App., March 8, 1972).

[2] In the present case, the informant's tip fails to satisfy either of the two "prongs" of Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).[2]

[3] Officer Wilkerson's testimony was merely that the undisclosed informant was a credible person. The only reason he gave for believing that the informant was credible was that the informant appeared to be credible in the manner in which he imparted the information. On the other hand, Wilkerson testified that, to the best of his knowledge, he had not received information from this informant in the past, that he had not seen the informant prior to receiving the information, and that he had not known the informant prior to the day on which he received the information. In summary, Wilkerson's assertion that the informant was a credible person was just that—a mere assertion, unsupported by any underlying circumstances which would indicate that he was worthy of belief. A mere assertion or conclusion that an informant is credible, without more, is an insufficient basis for establishing probable cause, based on the informant's tip alone. Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); Stoddard v. State, 475 S.W.2d 744 (Tex.Crim.App. 1972).

Likewise, Wilkerson testified that the informant did not relate the circumstances by which he came to know that appellant had committed the robbery on March 11th, and was preparing to commit another robbery on the date of arrest. Again, unless some of the underlying circumstances upon which the informant based his conclusions are before the reviewing court, the informant's tip, standing alone, is insufficient to constitute probable cause. Aguilar v. Texas, supra; Stoddard v. State, supra.

[4, 5] Hearsay information, insufficient to constitute probable cause under Aguilar v. Texas, supra, may nevertheless become sufficient if adequately corroborated by independent observation of the arresting officer (or affiant, in the case of a warrant). Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); Polanco v. State, 475 S.W.2d 763 (Tex.Crim.App.1971). However, we believe that the independent observation in the present case was not such as to corroborate sufficiently the hearsay information so as to constitute probable cause for the arrest. The information gained by observation must in some sense be corroborative of the informer's tip that the arrestees committed the felony or were in the process of committing the felony. Whiteley v. Warden, Wyoming State Penitentiary, 401 U.S. 560, 567, 91 S.Ct. 1031 (1971). In the instant case the officers found appellant where the informant said he would be found and saw a Buick automobile at that location. These two facts are not corroborative of the tip that appellant had committed the robbery for which he was arrested or that he was planning to commit a crime. The record does not reflect that the officers had been informed that an automobile was used in the commission of the robbery, or that they were searching for a particular auto-

1. The officers heard a noise in the bathroom.

2. Although both of these cases concerned search warrants, the standard for determining the sufficiency of an informant's tip is the same for either search warrants or arrest warrants. *See* Whiteley v. Warden, Wyoming State Penitentiary, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971); Beck v. Ohio, 379 U.S. 89, 90, 85 S.Ct. 223, 13 L.Ed.2d 142 (note 6) (1964); Giordenello v. United States, 357 U.S. 480, 485, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958).

mobile in connection with the robbery. Therefore, the corroboration was insufficient to indicate that appellant had committed an offense, or that he was planning to do so.

Since the informant's tip was inadequate to constitute probable cause for the arrest, it follows that the search incident to the arrest was illegal, and that the items seized were not admissible.

[6] The defects in the informant's tip as a basis for probable cause to arrest are also present when the tip is viewed as a basis for probable cause to search. Therefore, even assuming that exigent circumstances justified the search without a warrant, the search would fail for lack of probable cause.[3]

[7] The State contends that the seizure of the "sawed-off" shotgun was legal as being a seizure of contraband in open view. According to the State, the officers were lawfully on the premises by virtue of the woman's consent to "look around" and that because the shotgun was in open view, its seizure was legal. The State's contention is based upon a misreading of the record. There is no testimony in the record that the weapon was in open view. To the contrary, the arresting officer's testimony was that appellant was reaching into the overnight case in which the shotgun was found at the time he was arrested. The shotgun was found inside the case subsequent to the arrest.

[8, 9] The State concedes, and rightly so, that the consent to "look around" was not consent to search the premises. While consent to look in a house may constitute consent, *see* Hannon v. State, 475 S.W.2d 800 (Tex.Crim.App.1972), under the circumstances here presented, we do not feel that the statements constituted voluntary consent to search. There was no testimony that the woman was aware of her right to refuse,[4] and she was not told that the officers were planning on conducting a search,[5] but rather, the implication was that they were merely looking for appellant. The lack of clarity by the officers in informing the woman of their purpose (based upon the officer's testimony), coupled with the fact that they were armed with shotguns, leads us to believe that voluntary consent was not given. *Cf.* Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); Paprskar v. State, 484 S.W.2d 731 (Tex.Crim.App., 1972).

Therefore, the admission of the shotgun and shell was error. The question which then arises, however, is whether the error was prejudicial, and of such nature as to compel reversal of this case.

[10, 11] The admission of illegally seized evidence may be harmless error. Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970). Before an error of constitutional dimension can be held to be harmless error, however, the reviewing court must be able to declare that it was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

In the instant case, three witnesses testified that the robbery was committed by three Negro males, all of whom wore long coats. All three witnesses testified that

3. Exigent circumstances, no matter how compelling, will not justify a search where probable cause is lacking. *e. g.*, Brown v. State, 481 S.W.2d 108 (Tex. Crim.App.1972).

4. It is not necessary to show that a person consenting to a search was warned of his right to refuse, or that he knew of his right to do so, in order to support a finding that the consent was freely and knowingly given. DeVoyle v. State, 471 S.W.2d 77 (Tex.Crim.App.1971). However, such a showing is of evidentiary value in determining whether valid consent was given.

5. The woman denied that she consented to the entry and denied that she was aware that the men were police officers. However, in reviewing the action of the trial court, we must consider the evidence most favorable to the court's action.

appellant wore a pencil-thin moustache at the robbery. All three witnesses identified appellant, without equivocation, as being one of the robbers. One of the three testified that appellant pointed a shotgun at him during the course of the robbery, and the witness identified the shotgun which was seized as being the one which was used by appellant. There was some deviation between the testimony of the witnesses as to the appellant's dress at the time of the robbery but all were positive that he was one of the robbers.

The defense was alibi. Appellant's wife testified that on the evening immediately preceding the robbery, she took her daughter to a hospital for treatment of asthma and that she returned home on the morning of the day of the robbery, leaving her husband at home to care for the child. She testified that she then left home and went to her place of employment, and from there, called home at approximately the time of the robbery and talked with appellant. Appellant's mother-in-law testified that appellant was at the home at the time the robbery occurred. In rebuttal, the State offered testimony from a records custodian of the hospital that she had no record of the child receiving treatment on the date the mother testified she did.

The defense also offered a photograph of appellant which was taken on the day after his arrest. In argument, defense counsel stated that the photograph indicated that appellant had a larger moustache than the one described by the witnesses. However, none of the witnesses were asked to examine the photograph and to compare the moustache shown with the one which the robber wore.[6]

In light of the unequivocal testimony of the three witnesses that appellant was one of the robbers, and the rebuttal evidence which weakened the alibi defense, we feel that the error in admitting the shotgun was harmless. Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); Rodgers v. State, 468 S.W.2d 438 (Tex.Crim.App.1971). Appellant's first ground of error is overruled.

At the punishment stage of the trial, the State offered a set of fingerprints of the appellant, taken that day and a "prison packet" which contained a set of fingerprints and records of five prior convictions of appellant. There was expert testimony that the fingerprints contained in the packet were the same as those taken from appellant earlier that day.

[12] In his second ground of error, appellant contends that four of the five convictions contained in the packet were not admissible because they were accompanied by only one set of fingerprints. He maintains that the one set referred only to one conviction, and that the remaining convictions were therefore not properly proved. This contention is without merit.

An examination of the packet indicates that it consists of certified copies of records of the Texas Department of Corrections pertaining to one Johnny Lerl Cole, including the judgment and sentence in five separate convictions and one set of fingerprints. An expert witness testified that the fingerprints contained in the packet matched a set which he had taken from appellant on the same day. The fingerprints are used as a means of insuring that the person on trial is the same one to whom the packet refers. The fingerprints refer to the packet as a whole. This method of proof has been consistently upheld by this Court. *e. g.*, Emerson v. State, 476 S.W.2d 686 (Tex.Crim.App.1972); Jones v. State, 470 S.W.2d 874 (Tex.Crim.App.1971). Appellant's second ground of error is overruled.

6. The defense did elicit testimony that two of the State's witnesses had identified a photograph of appellant on March 16, the day before the photograph in question was taken. If anything, this testimony would seem to have only the effect of bolstering the State's identification evidence.

[13] Appellant has also filed a pro se brief in which he raises two additional grounds of error. His first additional ground of error is as follows:

"The court committed reversible error in purposefully suppressing evidence pertaining to and vital to the defense establishing the facts of the illegal arrest of appellant, done in violation of appellant's rights under the Fourteenth, Fourth and Ninth Amendments to the U. S. Constitution."

In the argument supporting this ground of error, appellant contends that the prosecutors suppressed evidence seized at the time of his arrest, which was a note used in the robbery and which was vital to his defense. The record is devoid of any evidence in support of this contention. The ground of error is overruled.

[14] In his second additional ground of error, appellant complains of an argument by the prosecutor. The record reflects that no objection was made to the argument. Therefore, the error, if any, is not preserved for review. *e. g.*, Verret v. State, 470 S.W.2d 883 (Tex.Crim.App.1971).

There being no reversible error, the judgment is affirmed.

MORRISON, J., concurs in the result.

ONION, Presiding Judge (dissenting).

I agree that the shotgun and shell, being the fruit of an illegal search and seizure, were inadmissible. I cannot agree that the constitutional error was harmless *beyond a reasonable doubt* under the test established by Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). See, also, Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969).

Therefore, I respectfully dissent.

DAIRYLAND COUNTY MUTUAL INSURANCE COMPANY OF TEXAS and Guadalupe Vargas, Appellants,

v.

Leonore D. MARTINEZ and Husband, Francisco Martinez, Individually and on Behalf of Ricardo Martinez, a minor, Appellees.

No. 6224.

Court of Civil Appeals of Texas, El Paso.

Aug. 2, 1972.

Rehearing Denied Sept. 20, 1972.

Suit by mother and father individually and on behalf of their son against parents' insurer and uninsured motorist seeking to recover for injuries sustained in motor vehicle collision involving the mother and son. The District Court, El Paso County, Charles R. Schulte, J., entered judgment for plaintiffs against both defendants jointly, and defendant insurer appealed. The Court of Civil Appeals, Preslar, J., held that evidence was not sufficient in absence of policy sued on, to establish that a policy was in force providing uninsured motorist coverage on date of the collision, but that it was not necessary to reverse judgment as to defendant uninsured motorist in order to give full and effective relief to defendant insurer.

Judgment affirmed as to one defendant and reversed and remanded as to other defendant.

1. Insurance ⇐665.3(1)

Evidence, in suit by mother and father individually and on behalf of their son against parents' insurer and uninsured motorist seeking to recover for injuries sustained in motor vehicle collision involving the mother and son, was not sufficient, in absence of policy sued on, to establish that

APPENDIX E

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130
TELEPHONE 504-589-6514

May 26, 1976

Messrs. John L. Hill
Attorney General
Patrick P. Rogers
Assistant Attorney General
P. O. Box 12548
Capitol Station
Austin, TX 78711

No. 75-3283 - John Lorl Cole v. W. J. Estelle, Jr., Director, Texas Dept. of Corrections

MANDATE STAYED TO AND INCLUDING June 24, 1976

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, if any, judgment, or Rule 21 decision, and the denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Mary Beck Kinney
Deputy Clerk

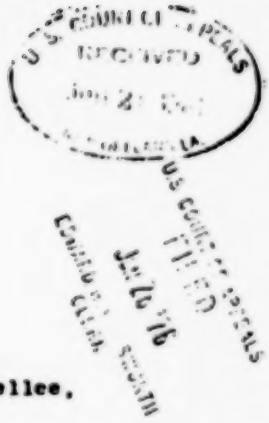
Enclosures

cc: Mr. Johnny L. Cole
Mr. Donald A. Smyth
Mr. Robert T. Bashett
Mr. Phil Burleson

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT



No. 75-3283

JOHN LERL COLE,

Petitioner-Appellee,

versus

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent-Appellant.

- - - - -

Appeal from the United States District Court for the
Northern District of Texas

- - - - -

O R D E R:

( ) The motion of _____
for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

( ) The motion of _____
for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

⋈ IT IS ORDERED that the motion for a further stay of the issuance of the mandate is DENIED.

UNITED STATES CIRCUIT JUDGE